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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA**

**FOURTH APPELLATE DISTRICT**

**DIVISION TWO**

In re Z.S., a Person Coming Under the  
Juvenile Court Law.

SAN BERNARDINO COUNTY  
CHILDREN AND FAMILY SERVICES,

Plaintiff and Respondent,

v.

D.E.,

Defendant and Appellant.

E071276

(Super.Ct.No. J250415)

OPINION

APPEAL from the Superior Court of San Bernardino County. Steven A. Mapes,  
Judge. Affirmed.

Diana W. Prince, under appointment by the Court of Appeal, for Defendant and  
Appellant.

Michelle D. Blakemore, County Counsel, and Dawn M. Martin, Deputy County  
Counsel, for Plaintiff and Respondent.

D.E. (mother) appeals the summary denial of her Welfare and Institutions Code<sup>1</sup> section 388 petition requesting another chance to have Z.S. (the child) returned to her custody. She contends that because the child's guardians are now divorced (requiring him to go back and forth between the two households) and she is able to provide a stable home, it is in the child's best interest to return to her care. Because we find that mother did not demonstrate any significant change in circumstances or establish that returning the child to her custody was in his best interest, the juvenile court did not abuse its discretion by summarily denying her section 388 petition. Consequently, we affirm the order.

## I. PROCEDURAL AND BACKGROUND FACTS<sup>2</sup>

Mother has given birth to two children; neither remain in her care.

### A. *The Older Sibling's Detention and Adoption*

In October 2012, San Bernardino County Department of Child and Family Services (CFS) filed a section 300 petition, and in November 2012 removed the child's older brother, K.S. (born June 2012) from his parents' custody. (*In re K.S. & In re Z.S.*, *supra*, E059401, E059947.) K.S. suffered a spiral fracture of the arm while in his parents' care. A physical examination also revealed healing rib fractures. Father denied causing the injuries, and mother did not believe that father had caused them. After a

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<sup>1</sup> Further unspecified statutory references are to the Welfare and Institutions Code.

<sup>2</sup> We take judicial notice of our prior nonpublished opinions involving mother's children: *In re Z.S.* (Jan. 26, 2017, E065593 [nonpub. opn.]); *D.E. v. Superior Court (CFS)* (Oct. 26, 2015, E064225 [nonpub. opn.]); and *In re K.S. & In re Z.S.* (July 2, 2014, E059401, E059947 [nonpub. opn.]). (Cal. Rules of Court, rule 81115(b)(1).) A portion of the factual background section is taken from these prior opinions.

contested jurisdictional and dispositional hearing, the juvenile court denied reunification services to both parents and set a permanency hearing. Over the parents' objection, the court terminated their parental rights. We affirmed. (*In re K.S. & In re Z.S., supra*, E059401, E059947.) K.S. was adopted. (*In re Z.S., supra*, E065593.)

*B. The Child's Detention and Guardianship*

In July 2013, CFS removed the child (born May 2013) from mother's care because mother remained with father, who was identified as the person responsible for K.S.'s injuries; the child was placed with the same family (the caregivers) who had adopted K.S. (*D.E. v. Superior Court (CFS), supra*, E064225.) Mother was provided reunification services and urged to separate herself from father. By the time of the 18-month review hearing, mother had made substantial progress in completing her case plan, and the juvenile court ordered CFS to transition the child into mother's care. The court ordered father to stay away from mother and the child. By February 2015, the court approved a plan of family maintenance for mother; however, one month later, it received information that documented mother's continued relationship with father. Upon the court's order, CFS filed a section 387 petition removing the child from mother's care. The caregivers were granted de facto parental status, and the child was placed back with K.S. and the caregivers. (*D.E. v. Superior Court (CFS), supra*, E064225.)

The contested section 366.26 hearing was held on February 24, 2016. (*In re Z.S., supra*, E065593.) Relying on the positive reports written by the visitation monitor who observed mother's visits with the child, and the results of a bonding study prepared by Dr. Suiter, the juvenile court found that mother and child shared a bond, and that that

bond outweighed the benefits of adoption. A plan of guardianship was ordered, and the caregivers/de facto parents were appointed to be the child's guardians. The child appealed, and we affirmed. (*In re Z.S., supra*, E065593.)

On July 6, 2018, mother filed a section 388 petition asking that the child be returned to her custody. In support of her petition, she stated that (1) the child was older and more vocal, (2) she had had a two-year restraining order against father, (3) she had spent the last three years working on herself, (4) she was in a healthy, supportive relationship, (5) she was financially stable, and (6) the guardians were now divorced. Mother argued that it was in the child's best interest to grant her petition because the child "would be in one home, not bouncing back between homes," and he "would also be in a stable, loving, safe home where all his physical and emotional/educational needs would be met."

On August 16, 2018, the guardians objected to mother's request. They asserted that their separation was "very amicable," they "co-parent [the] boys and share 50/50 custody," and they attend "all school functions, sporting events, and any other activity that takes place for the boys as a united front." They stated that they allowed mother to spend more than the court-ordered three hours a month with the child, included her in family functions, and permitted her to stay overnight occasionally when the visits lasted too late. They asserted that mother "never did motherly things with the boys," rather, she enjoyed playtime until she "couldn't handle them anymore." They observed mother ignoring the child's older brother (K.S.), and only playing with the child. Although the guardians had changed the child's name, mother continued to call him Z.S. When

corrected by the child, mother would ignore him and keep calling him by the incorrect name. They described mother's behavior as immature and her lifestyle as carefree and unstable.

Regarding mother's healthy, supportive relationship, the guardians observed it to be an "on and off again relationship." They were aware that the boyfriend was "currently going through the Court system himself to fight for custody of his little boy with his Ex" and that the couple lied to the "Ex" about them being together in order to "hide it from the Court system." The guardians declared that regarding mother's financial situation, mother had informed them that she allowed her car to be repossessed and indicated that she was going to quit her job and work out of her garage in order to decrease her expenses. Mother also indicated she was going to work from home in order to care for her boyfriend's one-year-old son. The guardians further noted that mother never offered to pay for any of the child's expenses, such as food, clothing, basic necessities, or the cost of his sport activities.

The guardians did not believe that removing the child from their care was in his best interest since he would be removed from his older brother. They noted that the child was involved in school and sports and was thriving. Also, they stated that when mother was not around, the child did not ask about her.

In the August 24, 2018, response to the section 388 petition, CFS recommended that the petition be denied and that the court terminate mother's parental rights and free the child for adoption. The social worker opined that "[r]emoving the child from his current placement would potentially re-traumatize" him as he stated that he likes living at

the guardians' homes and does not want to live with "his biological mom." When the social worker met with mother on July 31, 2018, she "appeared nonchalant, showed no emotion and said 'it was an accident' when asked about [K.S.'s] severe injuries."

However, she also disclosed that she was "naïve" and she was now sure that father had hurt K.S. The social worker doubted that mother had made positive changes warranting her another opportunity to reunite with the child.

The social worker described the guardians as loving and appropriate; they shared custody of the child and his brother, with the boys alternating between their homes with no adverse effect. The social worker stated that "[f]or the past five years, the child has continued to bond with his concurrent planning caretakers and is thriving psychologically, developmentally, and physically. The caretakers have continuously demonstrated an ability to be protective and act in the best interest of the child."

According to CFS, the child was doing very well in his placement, the caretakers wanted to adopt him, and it was "not in the best interest of the child for court orders to change."

On August 29, 2018, the juvenile court informed the parties of its tentative decision to deny mother's request for a hearing on her petition based on a lack of best interest and no substantial change in circumstances. Pointing out the prior finding of a bond between mother and the child, mother's counsel argued that that bond had increased over time as mother was spending weekends and nights with the child. Although counsel complimented the guardians for doing a "fine job," he emphasized that circumstances had changed because they were now divorced. When questioned about mother's past failure to protect her children, mother's counsel claimed that mother had not had any contact

with father, she had a restraining order against him, and she had been in a relationship with another man for the last year and a half.

The juvenile court explained: “[O]ther than the fact that they’re divorced, which happens in a lot of families, unfortunately, I don’t know what detriment there is to him staying in that situation. He is just like any other child of divorce who has loving parents and shares time with them.” Mother’s counsel replied: “There is a major difference. In a divorce, the child normally is the child . . . of both parents. . . . [T]hese divorced people were only guardians of this child. They weren’t parents.” The court noted that the guardians have been “in the parental role.” Counsel replied: “But they were guardians, not parents. . . . If they split up, it’s normally the guardianship is at risk.” In contrast, counsel pointed out that mother has always been the “mother of this child.” The court acknowledged that it could be a different situation if the guardians were going through an acrimonious divorce, but it pointed out that there is no evidence to suggest that or that the guardians are using the children as pawns to get back at each other. The court also considered the bond that the child had with his older brother, who had been adopted by the guardians, and the consequences of separating the siblings. Accordingly, the court denied mother’s petition without conducting an evidentiary hearing.

## II. DISCUSSION

Mother contends the juvenile court abused its discretion by summarily denying her section 388 petition, reasoning that she had made a sufficient, prima facie showing to merit a hearing.

“Section 388 permits ‘[a]ny parent or other person having an interest in a child who is a dependent child of the juvenile court’ to petition ‘for a hearing to change, modify, or set aside any order of court previously made or to terminate the jurisdiction of the court’ on grounds of ‘change of circumstance or new evidence.’ (§ 388, subd. (a).)” (*In re Lesly G.* (2008) 162 Cal.App.4th 904, 912.) A parent must “establish[] by a preponderance of the evidence that (1) new or changed circumstances exist, and (2) the proposed change would promote the best interest of the child. [Citation.] The parent bears the burden to show both a “‘legitimate change of circumstances’” and that undoing the prior order would be in the best interest of the child.” (*In re S.J.* (2008) 167 Cal.App.4th 953, 959.)

A parent need only make a prima facie showing to prompt the right to a hearing on his or her petition. A prima facie showing is made when the parent demonstrates facts that will support a favorable result if credited by the court. “‘Whether [the petitioner] made a prima facie showing entitling [the petitioner] to a hearing depends on the facts alleged in [the] petition, as well as the facts established as without dispute by the [dependency] court’s own file . . . .’” (*In re B.C.* (2011) 192 Cal.App.4th 129, 141.) “‘[I]f the liberally construed allegations of the petition do not make a prima facie showing of changed circumstances and that the proposed change would promote the best interests of the child, the court need not order a hearing on the petition. . . .’ [Citation.] [¶] The appellate court “‘will not disturb [a] decision unless the trial court has exceeded the limits of legal discretion by making an arbitrary, capricious, or patently absurd determination [citations].’”” (*In re Mary G.* (2007) 151 Cal.App.4th 184, 205.)



We find no abuse of discretion here. Mother's petition demonstrated that she was employed, the guardians were divorced, and father was not in her life as evidenced by a restraining order against him and a relationship with another man. However, the guardians provided evidence to contradict mother's portrayal of her changed circumstances: Mother allowed her car to be repossessed and indicated that she was going to quit her job and work out of her garage to decrease her expenses. Mother's healthy, supportive relationship experienced a few breaks, one resulting in her moving in with the maternal grandmother. The guardians' divorce was amicable and did not change their coparenting of the child. None of the changes identified by mother sufficiently addressed the issue of her "protective capacity." In a recent interview, the social worker observed mother to be "nonchalant, show[ing] no emotion and sa[ying] 'it was an accident' when asked about [K.S.'s] severe injuries." Mother claimed to be "naïve" while indicating that she was now certain that father had hurt K.S. Mother's evidence failed to establish a prima facie case that her circumstances had changed.

Even if we were to assume that circumstances had changed, mother did not establish a prima facie case that the proposed change in the order would promote the best interest of the child. Mother claimed that it was better for the child to live in a stable home rather than move back and forth between the guardians' households. However, living in one house does not necessarily guarantee stability and security, as evidenced by the fact that the child's older brother was injured while living with mother and father in one house. The guardians continued to make the child and his brother their priority despite their divorce. They shared equal custody and attended all of the child's activities

“as a united front.” The child was bonded to the guardians, he was “thriving psychologically, developmentally, and physically,” and he wanted to live with them, not with mother. Additionally, the child was bonded with his older brother, with whom he had primarily lived his entire life.

Because mother’s petition failed to make a prima facie showing to trigger the right to proceed by way of a full hearing, we conclude that the juvenile court did not abuse its discretion in summarily denying the petition.

### III. DISPOSITION

The juvenile court’s order summarily denying mother’s section 388 petition is affirmed.

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McKINSTER  
J.

We concur:

RAMIREZ  
P. J.

SLOUGH  
J.